IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 107 of 2001
with
COMPANY PETITION No 108 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW VISION LASER CENTERS (RAJKOT) PVT. LTD.

Versus

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Appearance:

1. COMPANY PETITION No. 107 & 108 of 2001
MR ASHOK LALBHAI with MR AR MAJMUDAR for Petitioner
MR DN PATEL and MS PJ DAVAWALA for Respondent No. 1
MR MA KUVADIA - OFFICIAL LIQUIDATOR

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 24/01/2002

COMMON ORAL JUDGEMENT

Heard Mr Ashok Lalbhai with Mr AR Majmudar learned counsel appearing for the petitioners and considered the contents of the petition. I have also heard Mr DN Patel, learned Senior Central Government

Standing Counsel as well as Ms. PJ Davawala, learned Addl. Central Government Standing Counsel. I have also heard Mr MA Kuvadia learned Official Liquidator.

2. These petitions are for approval of the scheme of amalgamation of New Vision Laser Centres Ltd. (hereinafter referred to as `the Transferor Company') with the New Vision Laser Centres (Rajkot) Ltd. (hereinafter referred to as `the Transferee Company'). The scheme of amalgamation has been approved by shareholders of the transferee Company by giving their written consent. The shareholders and the secured creditors of the transferor Company have given written consent approving the proposed scheme. Hence, the meetings of the shareholders of both the companies and the creditors of the transferor Company were dispensed with as per orders dated 23-3-2001 in Company Application Nos. 82 and 83 of 2001.

3. After the petitions were admitted on 4.5.2001, they were advertised in two daily newspapers Indian Express and Loksatta (Vadodara). No one has come forward for opposing sanction to the scheme of amalgamation.

4. Notices of petitions have been served upon the Central Government and Mr DN Patel, learned Senior Standing Counsel and Ms. PJ Davawala, Standing Counsel for the Central Government appear for the Central Government. The learned counsel state, and letter of the Registrar of Companies dated 19-9-2001 read with letter dated 11-9-2001 of the Regional Director at Mumbai is placed on record indicating, that the Central Government does not propose to object to the proposed scheme of amalgamation. The said letter also referred to certain typographical mistakes which have been subsequently permitted to be corrected by the Court as per the order dated 6-12-2001.

5. Notice of the petition filed by the Transferor Company has also been served upon the Official Liquidator as required under the second proviso to section 394(1) of the Act and the learned Official Liquidator has filed his report dated 22-10-2001 stating that the affairs of the transferor Company have not been conducted in a manner prejudicial to its members or to public interest.

6. At the hearing of these petitions, the learned Official Liquidator has submitted that although the affairs of the transferor Company have not been conducted in the manner prejudicial to its members or to pubic interest, there is one legal objection which he is

constrained to raise and that is violation of Sections 77 and 42 of the Companies Act, 1956 (hereinafter referred to as `the Act'). It is pointed out that the transferor Company was holding 4,99,980 shares in the transferee Company and that on account of the proposed amalgamation, the Transferee Company itself will be holding 4,99,980 shares in the transferee Company.

Section 77 of the Act provides that, no Company limited by shares, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104. Similarly, Section 42 provides that, except in the cases mentioned in the section, a body corporate cannot be a member of the Company which is its holding Company and any allotment or transfer of shares in a Company to its subsidiary shall be void.

It is submitted that the proposed merger will result into violation of Sections 77 and 42 of the Act and, therefore, the proposed amalgamation may not be sanctioned by this Court.

7. On the other hand, Mr Ashok Lalbhai with Mr AR Majmudar learned counsel appearing for the two companies submit that the objection raised by the learned Official Liquidator is misconceived because the provisions of Section 391 to 394 constitute a complete code in itself relating to amalgamation and merger and that the provisions of Sections 42 and 77 are not applicable in case of amalgamation or merger. The learned counsel placed strong reliance on the decision of the Delhi High Court in Himachal Telematics Ltd., In re, 1996 (86) Company Cases 325. The learned counsel have further placed on record a statement showing the names of shareholders of transferor Company, the number of shares to be allotted to them in the transferee Company (new shares) in lieu of their holding in the transferor Company (aggregating to 3,22,420 shares), number of shares which are hitherto being held by the transferor Company in the transferee Company (aggregating to 4,99,980 shares) and the total number of shares to be allotted and transferred to those shareholders in the transferee Company (aggregating to 8,22,400 shares). The learned counsel submit that it was open to the transferor Company to transfer its holding in the transferee Company to the said 20 shareholders and thereafter to go for amalgamation with the transferee Company and in that case, the objection on the score of alleged violation of Sections 42 and 77 of the Act could not have been raised at all. It is submitted that if that could be done prior

in point of time before amalgamation, there is no reason why the same cannot be done simultaneously as a part of the scheme of amalgamation.

8. In rejoinder, the learned Official Liquidator submits that the facts of the Delhi High Court's case in Himachal Telematics Ltd. were different and the ratio laid down therein is not applicable to the facts of the present case. It is further submitted that if 4,99,980 shares of the transferor company in the transferee company were transferred to the 20 shareholders of the transferor Company before amalgamation, there could have been liability for capital gains tax. However, after referring to the financial position of the Companies and their losses, this ground is not pressed.

9. Having heard the learned counsel for the petitioner and the learned Official Liquidator, it appears to the Court that the principle laid down by the Delhi High Court in Himachal Telematics Ltd. (supra) is applicable to the facts of the instant case also. Dealing with a similar objection, it was held in the said decision as under:-

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In the case on hand, the stand of the respondent is not that the affairs of the company are not being conducted in a manner which is prejudicial to the interest of its members. The stand, as has been contended before me by Mr. Tikku, is that the objection raised by the respondent regarding sections 77 and 42 of the Act would fall in the category of amalgamation not conducive in public interest. I am afraid, the argument of learned counsel for the respondent is not well founded. the objection raised before this court pursuant to section 42 of the Act is that as a consequence of the scheme of amalgamation, there would be violation as transfer of shares from subsidiary company to transferee- company would result and the same would be hit by section 42. That objection, which I will deal with later, is not an objection in public interest. If the scheme of amalgamation is inconsistent with other provisions of the Companies Act, 1956, then the Legislature in its wisdom ought to have added in the proviso to section 394 after the words, "public interest" "or anything inconsistent with

other provision of this Act". That being not the situation, in the plain language of section 394, the Court cannot permit the respondent to read a further condition which has not been intended in the section. Three affidavits have been filed by the respondent, except taking objection to the scheme as being hit by the provisions of sections 42 and 77 of the Companies Act, it has not been mentioned how the scheme is against public interest. Rather in one of the affidavits filed by the respondent, the stand of the respondent is that scheme is otherwise in public interest.

Adverting to the submission of learned counsel for the respondent that the scheme, if approved, would be hit by section 42 of the Companies Act, 1956, the rule of interpretation of a statute is that the statute has to be read harmoniously. If there are not controlling provisions in the subsequent sections of the Act, then no other meaning can be assigned to the language of a section. Where a company is in the process of incorporation, section 42 falls in that part of the Companies Act, which deals with incorporation of company and matters incidental thereto. This part deals with the memorandum of association, names of the companies, articles of association, change of the registration of companies, and sections 41 and 42 deals with membership of the company. From a plain reading of the section it cannot be said that this section is intended to be read with section 391, 392 or 394 at the time when the scheme of the amalgamation is pending before the court for approval and when the shareholders and the creditors have approved the same and the respondent has also filed an affidavit that the affairs of the company are not conducted in a manner prejudicial to the shareholders or prejudicial to the public interest.

In view of the foregoing discussions, I do not find any merit in the contention of learned counsel for the respondent that section 42 of the Act would be applicable to the scheme of amalgamation.

This decision, therefore clearly supports the submission of the learned counsel for the petitioners that the provisions of Sections 391 to 394 are not controlled by the provisions of Sections 42 and 77 of the Act.

10. There is also substance in the submission of the learned counsel for the petitioners that the transferee Company could have reduced its capital to the extent of 4,99,980 and over and above 3,22,240 new shares, another 4,99,980 new shares could have been issued to those 20 shareholders in lieu of their holding in the Transferor Company, and the practical result would have been the same. Hence instead of issuing 8,22,420 new shares in the transferee Company in favour of those 20 shareholders, the proposed amalgamation envisages issuance of 3,22,420 new shares and 4,99,980 existing shares in the transferee company in favour of those 20 shareholders.

11. In view of the above, the Court sees no reason for accepting the objection raised by the learned Official Liquidator not to sanction the scheme of amalgamation.

12. Having gone through the petitions, I am satisfied that the amalgamation would be in the interest of the companies and their members. In the circumstances, the scheme of amalgamation (Annexure C to the petition) is sanctioned. Prayer in terms of para 24(a) in Company Petition No.107 of 2001 and prayer in terms of para 21(a) in case of Company Petition No.108 of 2001 are granted.

13. The petitions are accordingly allowed and stand disposed of.

14. So far as costs to be paid to the learned Standing Counsel for the Central Government are concerned, I quantify the same at Rs.3500/- each per petition. The same be paid to Mr DN Patel and Ms. PJ Davawala by the petitioner companies.

(M.S. Shah,J)

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